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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/626,636

07/27/2000

Gary Karlin Michelson M D

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MARTIN & FERRARO, LLP  
1557 LAKE O'PINES STREET, NE  
HARTVILLE, OH 44632

EXAMINER

SEVERSON, RYAN J

ART UNIT

PAPER NUMBER

3731

MAIL DATE

DELIVERY MODE

11/26/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<p align="center"><b>Advisory Action</b> <b>Before the Filing of an Appeal Brief</b></p>	<p><b>Application No.</b> 09/626,636</p>	<p><b>Applicant(s)</b> MICHELSON M D, GARY KARLIN</p>	
	<p><b>Examiner</b> Ryan Severson</p>	<p><b>Art Unit</b> 3731</p>	

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 06 November 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
- (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ They raise the issue of new matter (see NOTE below);
- (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
- The status of the claim(s) is (or will be) as follows:
- Claim(s) allowed: \_\_\_\_\_.
- Claim(s) objected to: \_\_\_\_\_.
- Claim(s) rejected: \_\_\_\_\_.
- Claim(s) withdrawn from consideration: \_\_\_\_\_.

#### AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_
13. ☐ Other: \_\_\_\_\_.

/Todd E Manahan/  
Supervisory Patent Examiner, Art Unit 3731

Continuation of 11. does NOT place the application in condition for allowance because:

Applicant argues the curve of Laurain does not meet the limitation requiring the center of the curve to be located more proximal than the ends. However, applicant appears to have merely ignored part of the structure of Laurain and also ignored the combination proposed. The center of the concave curve of Laurain not the center of the tubular portion (12) upon which applicant bases this argument. Examiner has merely used the generally curved, contour shape of Laurain as a teaching for making the end of the Brantigan device concavely curved. Doing so would provide a structure that meets the structural limitations of the claims. Therefore, this argument is not persuasive.

Applicant argues both Brantigan and Cozad teach away from Laurain because Brantigan and Cozad have devices where the ends terminate in a perpendicular plane and Laurain has an end that contours to the bone. However, this is the reason the combination is made (to allow the device of Brantigan and Cozad to contour to bone). Therefore, it is unclear how the references teach away from one another. Laurain provides an feature that is desirable, and adding that feature to Brantigan in no way is teaching away from the functionality or structure of Brantigan. Therefore, this argument is not persuasive.

Applicant argues both Brantigan and Cozad teach away from Morrison because Brantigan and Cozad are tubular and Morrison is not. However, Examiner has only relied on the notion of including slots in the side of the devices of Brantigan and Cozad, and not modifying the fact that those devices are generally tubular in shape. With slots included in the Brantigan device, the device would still be generally tubular in shape, with each half of the tube separated by the slots. Therefore, this argument is not persuasive.

Applicant argues the combination of Brantigan, Cozad, and Codman does not disclose a hollow guard, an implant, and an implant driver. Examiner directs applicants attention to paragraphs 15-20 of the outstanding final rejection, in which all of the structural limitations of the claims are set forth as being disclosed and/or obvious in view of the cited prior art. Therefore, this argument is not persuasive.

Applicant argues the combination of Brantigan and Cozad does not disclose a wall that is continuous around the mid-longitudinal axis of the guard and an opening through the wall. However, Brantigan clearly discloses a solid wall (see, for example, figure 4) and an opening in the wall (the distal opening, for example). Therefore, this argument is not persuasive.